IN THE SUPREME COURT OF THE UNITED STATES

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LEE M. TILL, ET UX., :

Petitioners :

v. : No. 02-1016

SCS CREDIT CORPORATION. :

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Washington, D.C.

Tuesday, December 2, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

REBECCA J. HARPER, ESQ., Marion, Indianà; on behalf of the Petitioners.

DAVID B. SALMONS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

G. ERIC BRUNSTAD, JR., ESQ., Hartford, Connecticut; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1016, Lee Till v. SCS Credit Corporation.

Ms. Harper.

ORAL ARGUMENT OF REBECCA J. HARPER

ON BEHALF OF THE PETITIONERS

MS. HARPER: Mr. Chief Justice, and may it please the Court:

Deferred payments under section 1325(a)(5)(B)(ii) must equal the present value of the collateral. Historically present value has been an objective concept equalling the real interest rate and inflation, which is the time value of money.

The Seventh Circuit has redefined this concept in a manner that seriously disrupts two fundamental principles of chapter 13, that being the equal treatment of creditors similarly situated and the debtor's rehabilitation, the debtor's access to chapter 13.

QUESTION: When you say traditionally it's been understood to mean real interest rate plus time value of money, it means real interest rate for the particular lender. Isn't -- I mean, the -- the interest rate that is given to different lenders is not always the same.

MS. HARPER: Under chapter 13, you're simply

trying to value the money. It's not particular to a specific creditor because you're just trying to equate the amount of money over time to a particular amount of the allowed secured claim.

QUESTION: Well, that's right, but the interest rate that I have to pay when I buy a house with a very small down payment is much higher than the interest I have to pay if I make a much larger down payment.

MS. HARPER: That's --

QUESTION: And the interest I have to pay, if I make, you know, over $200,000 a year is less than I would get if I have a lower income. So you can't just speak of a fair interest rate in the abstract as though it's a -- it -- it's a platonic number floating out there. It certainly depends upon the solvency and -- and the record of payment of the person paying the interest. Isn't that right? I --

MS. HARPER: You're -- you're talking about interest in the open market, though, which is not what we're talking about here. We're -- we're talking more about --

QUESTION: I'm surprised to hear you saying this because I thought your brief acknowledged that even after you begin with the -- with a discount rate, you know, the -- the Fed's discount rate -- I thought your briefs

acknowledged that the bankruptcy court could add to that a -- a surcharge depending upon the riskiness of the chapter 13 debtor.

MS. HARPER: That --

QUESTION: You didn't acknowledge that? I thought your brief acknowledged that. I'm -- you -- you really want to use the discount rate, period, and nothing -- nothing tagged on top of it.

MS. HARPER: I was going to get to that, but in certain circumstances an additional risk factor may be required, but it is our position that there are many other statutory elements under -- provisions under chapter 13 that cover the types of risks that would normally be included in a contract, for instance.

QUESTION: Well, I -- I think the same thing that's bothering Justice Scalia, or that prompted his question in any event, is -- is troubling me. When I -- I read the briefs, I -- I thought that the coerced loan approach, which you object to, did have certain deficiencies, because you had to have testimony what the interest rate is, you have to conform it to the particular transaction, it's hard to administer. I frankly don't see how yours is much different because you add a premium to the prime rate. What is that premium going to be? Why shouldn't it depend on the transaction? Why shouldn't it

depend on the risk of default? Why doesn't your approach have all of the same problems as the coerced loan approach?

MS. HARPER: Because you need to limit the purpose of that premium. Most risk elements are encompassed within other sections of chapter 13 because your normal risk of deterioration of the collateral, for instance -- that's adequate protection. So you don't have to add on for that. You don't have -- the risk of default is covered by the fact that there is a wage assignment in effect.

I'm saying that in certain instances --

QUESTION: Well, but if that was true, you could bring up the same thing when you're cross-examining the expert on the coerced loan approach and say, well, we don't want 21 percent because there's a wage assignment. It's the same answer.

MS. HARPER: No. The 21 percent, such as the 21 percent that was in this record, there was no support for at all. The creditor did not show any basis for --

QUESTION: It showed what the creditor had been getting before, and that, I thought, was the argument, that in -- out of chapter 17 -- 13, in chapter 13 our contract rate was 21 percent, and that represents what it would cost this borrower if he were today to take those

funds, get the same funds. It would cost him 21 percent because he's a high-risk borrower. That's -- that's the theory. But you're saying that that is a wrong theory, as Judge Rovner said in her opinion, but it's -- it's not because it's more difficult to apply than some other theory.

MS. HARPER: Well --

QUESTION: I think you're -- you're saying that that's a wrong approach, and maybe you'll say why.

MS. HARPER: Yes. It's the wrong approach because the only thing that the creditor is entitled to protection for under 1325 is the value of the collateral. In that 21 percent contract rate, first of all, on the record in this case the expert couldn't even say what it consisted of. But in your typical contract rate of interest, you're going to have transaction charges. You're going to have the risk of default, which has already occurred here, the risk of bankruptcy default, for instance. That risk has already occurred here. The creditor has already been compensated for that.

QUESTION: You think that makes this a better -- a better borrower? It -- it makes it a safer loan when you're -- when you're -- you're owed money by somebody who has already been through bankruptcy once? You think you're in better shape?

MS. HARPER: In many --

QUESTION: Gee, that's -- that's a novel approach.

MS. HARPER: In many respects, it is safer because here you're talking about a subprime lender who did enter into a contract where it assumed a great amount of risk, but now the debtor's debt structure, his payment obligations have been modified by the chapter 13.

QUESTION: So you think a lender has two different loan candidates in front of him, one he thinks is going to go through bankruptcy and the other he thinks is not, so he's going to give the loan to the first one?

MS. HARPER: I think that --

QUESTION: That's -- that's very difficult for me to assume.

MS. HARPER: -- a lender may charge additional interest if -- under State law if the lender has indication that the debtor may go through bankruptcy, but normally in the subprime market, that's all factored in because most subprime candidates are candidates for possible bankruptcy in the future.

QUESTION: Is it a fact that most chapter 13 bankrupts don't make it to the end of the program?

MS. HARPER: Well --

QUESTION: In fact, the vast majority fail.

MS. HARPER: That's not necessarily true when you talk --

QUESTION: I thought we had statistics on that.

MS. HARPER: The problem is most of the statistics focus on the default rate just from the filing, the number of filings. They don't focus on the default rate after the chapter 13 has been confirmed because there are many -- the case by that point has been reviewed by the court and it's determined to have been feasible. The debtor by that point has been making payments for a substantial period.

QUESTION: Are there statistics on that kind of cases that you're describing now?

MS. HARPER: There -- I have found limited statistics. One study that I found said that 63 percent of the chapter 13's completed successfully after they reached the point of confirmation. So there is suggestion that after the point of confirmation, the success rate gets much higher, which only makes sense because a lot of times --

QUESTION: It's still not a very good risk. I mean, you --

MS. HARPER: Well --

QUESTION: -- you lend money to somebody. Your chances of getting it back are 2 out of 3?

MS. HARPER: The subprime lender's risk in the open market is not good either. So --

QUESTION: Well, I think it's better than 2 out of 3.

MS. HARPER: It's five times higher than the prime market.

QUESTION: Let -- let me ask you a -- the -- the way I see these two approaches. I'm assuming that -- that you're -- you're willing to allow over the prime rate some addition which the -- the courts that -- that follow your -- your favored approach do allow for risk factor. So under your theory, you take the prime rate, and then it is up to the bankruptcy judge to assess what the risk is, something that I think judges are probably not very well qualified to do.

You know when -- when you pick the prime rate, that that's not the market rate. It obviously isn't. So it's well below the market rate. I mean, here you had a 21 percent loan and you're going to take what? I don't know. A prime rate of 8 percent at most? You know it's wrong. And then the bankruptcy judge has to make it right. Okay?

Under the other approach, you take the market rate, the rate that was actually adopted between these -- these two people operating in a free market. Now, it --

it may be -- may be high, it may be low. You don't know for sure that it's either one. It's -- it's -- it may be accurate. It is not surely inaccurate the way picking the prime is. And then the adjustment to be made by the bankruptcy judge is much less. If there are some special factors that show a lesser risk now than there was when the loan was originally made, he might take them into account.

Now, as I see it, the less discretion that is left to the bankruptcy judge and the more weight that is given to the -- to the real forces of the operating market, the better off we are. I -- I don't think that bankruptcy judges are very good risk calculators.

MS. HARPER: That totally eliminates the fact that a chapter 13 has been filed and that there are certain minimal requirements for chapter 13 confirmation. A -- and the problem is that market rate, the way these courts have defined it -- has come to mean anything and everything. We're talking about two different market rates here.

QUESTION: I'm talking about using the rate of the loan that was actually made.

MS. HARPER: But there is nothing in the statute that requires the creditor to be compensated for all of those items that were included in the pre-petition

contract.

QUESTION: No, but he has to be given the current value of his security and the current value of his security, which is not going to be received 20 years from now or 5 years from now, depends upon how much of a credit risk there is that that money will actually be paid.

MS. HARPER: How could the -- how could you possibly contract in advance for the present value of this particular allowed secured claim, $4,000? That amount wasn't even known when the contract rate was established. The contract rate was based upon particular characteristics of the creditor and the debtor and many --

QUESTION: In -- in an open market. And if the debtor could have gotten -- it's a very competitive market, as I understand it. And if the debtor could have gotten a lower rate elsewhere, he presumably would have.

MS. HARPER: That's --

QUESTION: I'm just saying that that's -- that that's a reasonable starting point. Now, if there has to be an adjustment because market rates have gone down since then, that minor adjustment can be made, but that's going to be much less of an adjustment than you're going to have to leave to the bankruptcy judge if you begin with the prime rate which you know is wrong. You know that nobody would have made this -- this car loan at the prime rate.

MS. HARPER: That's not the question. The question is not what someone would make a new loan for because an allowed secured claim in chapter 13 is a claim. It's not a loan. Once the bankruptcy is filed --

QUESTION: Let me ask you this -- this piece of it. The -- Justice Scalia said to give this kind of you-pick-it discretion to the bankruptcy judge is a worrisome thing, but all of the cases that take this approach, the Treasury bill approach or the prime, seem to have a rather narrow range for that risk factor. They go from 1 percent to 3 percent, and none of them go over 3 percent. Where did they -- where did that range -- who invented that range that 3 percent would be the ceiling?

MS. HARPER: That's a good quèstion. I believe that it just results from the fact that in your typical chapter 13, you don't have a lot of special risk that has to be compensated for because you usually have the fixed asset, there's no hazard -- hazardous use, you've got a wage assignment. You -- substantial risk might result, for instance, in a chapter 13 if you had a balloon payment.

QUESTION: A what payment?

MS. HARPER: A balloon payment instead of periodic weekly payments, which is usually what you have in a chapter 13.

QUESTION: As I understand it, your expert in this case, your economist, testified that the prime rate was 8 percent and that in his view a reasonable risk premium would be 1.5. But he conceded under cross-examination that he was unfamiliar with the relevant rates of default or costs of servicing loans in the subprime market, which --

MS. HARPER: That's --

QUESTION: -- to my mind is conceding that he has no basis for picking 1.5 percent.

MS. HARPER: That 1.5 in that case was actually a local bankruptcy rule. But that same expert also testified that prime already includes 2 percent which could not be accounted for except for risk and transaction fees.

QUESTION: The risk -- the risk of a prime borrower, of a fat cat borrower.

MS. HARPER: But, again, we're not talking about borrowing on a new loan in a chapter 13. The -- we're talking about modification to an old loan, an existing loan. 1322(b)(2) allows you to modify that contract. So we're not looking at what this debtor would have to pay in the open market were it not for the chapter 13. That's not the proper inquiry.

If there are no further questions, I would

reserve the remainder of my time.

QUESTION: Very well, Ms. Harper.

Mr. Salmons, we'll hear from you.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. SALMONS: Thank you, Mr. Chief Justice, and may it please the Court:

The court of appeals here held that the bankruptcy courts are required to presume that the pre-bankruptcy contract rate of interest, which varies from creditor to creditor and could range anywhere from 0 to 40 percent or more in some jurisdictions, is the appropriate discount rate to use in calculating the present value of plan payments under section 1325. Now, that approach is mistaken, we submit, for three principal reasons.

First, it violates the core bankruptcy principle of equality of distribution for similarly situated creditors. Under the court of appeals' approach, two creditors could make car loans to the same debtor that resulted in allowed secured claims of equal value, and yet one would receive thousands more in plan payments solely because the other made its car loan at a time when the debtor's financial troubles had not yet become obvious.

QUESTION: Is that right? I just want to be

sure I understand the -- the point. I thought if you had that differential before the bankruptcy judge, it's a -- the original is a presumptive risk, and the judge could then resolve it by maybe compromising between the two.

MR. SALMONS: Your Honor, this is an important point because I think there is some misconception about what the court of appeals held in this case, and I think that's due in part to the fact that respondents, at least as I read their position, are not really defending the approach taken by the court of appeals. The court of appeals did not adopt a presumption in favor of the pre-bankruptcy contract rate because it thought that that represented accurately the relevant market, if you will, for the risks of -- and benefits and pròtections that exist under the Bankruptcy Code.

In fact, under the court of appeals' approach, the risk of nonpayment is really irrelevant. What the court of appeals says is that because the -- the creditor is denied use of funds for the period of the payment plan, that it therefore is entitled to whatever rate it would have gone out and funded a new loan at if it had been allowed to foreclose and reinvest the proceeds. Now --

QUESTION: I agree with you, and -- and the respondent is not defending that approach, but rather the approach that you use the rate of the -- of the original

loan as the starting point, and then adjust it as necessary.

MR. SALMONS: That's correct, and I just want to emphasize, though, that -- that the adjustment that the court of appeals would make is not one I think that anybody before the Court now would defend because the court of appeals would adjust only if you could prove that the -- a particular secured creditor is now making loans at some other rate and there's no reason to think why that has anything to do with what the present value of plan payments would be under 1325. And -- and the problem --

QUESTION: So, but you're saying -- but you're saying that under the respondent's view, that -- that the creditors would be treated differently?`

MR. SALMONS: If respondent's view is that you should have a presumption in favor of the pre-bankruptcy contract rate, then that would be the result. What's not clear to me is whether it's actually respondent's view that you should have a presumption in favor of the subprime contract rate or the highest contract rate allowed by State law because it's important to remember that pre-bankruptcy contract rates are going to vary. You could have a 0 percent lender. You could have a prime lender, and you could have a subprime lender. And there's no reason to think that any one of those necessarily

captures the unique mix of risks and benefits and protections that exist under the Bankruptcy Code.

QUESTION: Where do you get the principle that all secured creditors have to be treated equally? Where does -- where does that appear?

MR. SALMONS: Well, Your Honor, on -- I would refer you to page 19 --

QUESTION: I'm sure it's true of all unsecured creditors. I -- I don't know why --

QUESTION: Page 19 of what?

MR. SALMONS: I'm sorry, Your Honor. I would refer you to page 19 of the Government's brief where we refer to two cases by this Court, Bigeur v. the IRS and -- and Union Bank v. Wolas, that stand for the principle that -- that embody the notion that equality of distribution among creditors is a central policy of the Bankruptcy Code. That's this Court's language.

QUESTION: Similarly situated creditors.

MR. SALMONS: To be sure, Your Honor.

QUESTION: Not secured versus unsecured.

MR. SALMONS: That's why I gave the example that I did of two creditors that extend car loans and the only difference between them -- they have the exact same allowed value under the code for their claim. The only difference between them is that one made its loan 2 years

prior to bankruptcy when the -- when the debtor's credit history was not quite as bad and the other made it 2 weeks before bankruptcy when the only rate the debtor could get is --

QUESTION: Well, why isn't that a valid distinction?

MR. SALMONS: Because, Your Honor, from the standpoint of section 1325(a)(5), the relevant inquiry is what is the present value of the promised future payments from the debtor. All creditors are now facing the exact same situation, and I think respondent concedes this. And those are the risks of inflation, the time value of money, and the risk that particular payments may not be made under a plan. And there's no reason to think --

QUESTION: Well, and the risk --

MR. SALMONS: -- that those are different for creditors --

QUESTION: The risk of the security will just disappear too, you know, be totally devalued.

MR. SALMONS: Your Honor, I don't think that's embodied in section 1325(a)(5). If anything, that's captured in the higher replacement value standard for the valuing of the underlying claim that this Court adopted in Rash. And I would add that -- that one reason to think why the discount rate here doesn't need to go too far in

taking risks of nonpayment into account is that this Court in Rash adopted the underlying value here, replacement value, that's typically significantly higher than what the --

QUESTION: What has that to do with it? I don't see what that has to do with it at all.

MR. SALMONS: Well, Your Honor, what --

QUESTION: I mean, the reason I say that is I thought we were following a statute, and what the statute tells us is that the value of what they receive has to equal $4,000. They receive a set of promises to pay so much a month and the right to repossess if those promises are not kept. Now, that's what the statute tells us to do. So let's do it. What do we care how they arrived at the $4,000?

MR. SALMONS: Your Honor, my only point is that this Court in Rash noted that the higher replacement --

QUESTION: Whatever it said in Rash, reading the statute, unless they actually contradicted that, doesn't the statute say what I just said? So the problem in the case is how do we value the stream of payments plus the repossession value?

MR. SALMONS: I think --

QUESTION: I would have thought that that kind of thing is something bankruptcy judges are paid to make

judgments about all the time.

MR. SALMONS: Well, I -- I generally with -- with Your Honor's statement. What -- what I would add, though, is that the dispute in this case is not -- I mean, it's undisputed that inflation and the time value of money have to be taken into account under -- under the discount rate. The only question is whether you have to take into account the risks of nonpayment. We submit that there --

QUESTION: Of course, you do. Of course, you do. There is a risk of nonpayment and anything that didn't take that into account would not be equating the property with the $4,000.

MR. SALMONS: Your Honor, if -- if this Court believes that risks of nonpayment need to be taken into account, then we submit that the best way to do that is to start with a market indicator such as the prime rate that captures the time value of money and the risk of inflation and then -- then allow -- and -- and some risk of nonpayment, and then allow the bankruptcy court, which -- which, by the way, has just made a determination under 1325(a)(6) about the likelihood that -- that the payments will be made. And it has made --

QUESTION: Start with a figure that you know for sure is wrong. You know for sure that this person who got a 21 percent car loan because he was a bad credit risk was

never going to get the prime rate of 8 percent.

MR. SALMONS: Your Honor --

QUESTION: Why begin with -- with something --

MR. SALMONS: Your Honor, the answer to your question --

QUESTION: -- that you know is going to be abysmally low except for the fact that it will mean less money for the secured creditors and more money for the unsecured creditors, among whom is often numbered the United States?

MR. SALMONS: Your Honor -- Your Honor, the answer to your question --

(Laughter.)

MR. SALMONS: The answer to your question is because there is no rate you can find that -- that precisely reflects the unique mix of risks and benefits and protections that are available under the Bankruptcy Code. And so by definition, everyone here is talking about a proxy in some form or another.

Now, what the prime rate does do is is it accurately captures the time value of money and inflation. Now, we submit that the bankruptcy court, which has just examined the plan -- it has made a determination. In fact, it has found that the payments -- that the debtor will be able to make the payments under the plan -- that

bankruptcy court is in the best position to make a determination about plan-specific risks of nonpayment if those risks are going to be included. And that's a much more efficient system than forcing the bankruptcy court to go out and try and find some -- some elusive market that -- that would serve as a proxy for that determination.

QUESTION: Well, you could ask them to just look at the contract rate and, if need be, make some adjustment to that because of the fact that they won't have to --

MR. SALMONS: Your Honor --

QUESTION: -- go through the collection process.

MR. SALMONS: -- the difficulty with the contract rate approach is that it varies from creditor to creditor, and there really is no reason to think that -- that either secured creditors, or unsecured creditors for that matter, for purposes of -- of this case, should be treated differently. They all face the exact same risks of nonpayment, the exact same problems of inflation and time value of money. They are similarly situated.

QUESTION: In this case, as I understand it, this lender always charged 21 percent. It didn't differ from -- from lender -- borrower to borrower. Every one of them was charged 21 percent. That was the market.

MR. SALMONS: And -- and another secured creditor may have made a loan prior to that at a prime

rate to the same debtor, and it always charges the prime rate, neither of which is particularly relevant to the question of what's the value of the promised payments under the plan.

QUESTION: But if the second one was so stupid as to do that, why should he be protected?

MR. SALMONS: Well, Your Honor, it's not a matter of stupidity. It's a matter of the fact that a debtor's position changes over time and that what may be a good rate 2 years out from bankruptcy and that is still owed would not be the rate you'd give immediately before bankruptcy. And it may not be the relevant risks of nonpayment that exist under bankruptcy.

The point is that -- is that às -- as this Court understood in Rash, the -- the creditor is entitled to the value of its allowed secured claim, and this Court noted in Rash that already compensates significant risks of nonpayment.

Now, I would add, if I may --

QUESTION: Because if this had been foreclosure value, then if we were going through this exercise, well, the creditor would -- would then sell the asset and -- and charge a -- a new borrower with the same rate of interest. But the asset would be worth much less than the price --

MR. SALMONS: That -- that's correct, and Your

Honor, I would add that in fact we think it's possible to read the statute so there's no risk of nonpayment at all because the statute refers to property to be distributed under the plan, and it requires the bankruptcy court to make a finding that the debtor will be able to make payments. And there's no guidance whatsoever that would give bankruptcy courts a way to do anything more, and so we think in fact that an appropriate rate could even be the Treasury bill rate which --

QUESTION: Thank you, Mr. Salmons.

MR. SALMONS: -- excludes that.

Thank you.

QUESTION: Mr. Brunstad, we'll hear from you.

ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

ON BEHALF OF THE RESPONDENT

MR. BRUNSTAD: Mr. Chief Justice, and may it please the Court:

The formula approach is surely inaccurate. It systematically under-values the true risks and costs of a chapter 13 promise of repayment. We know at best statistically that chapter 13 debtors at best have a 40 percent rate of -- of payment on the plans.

QUESTION: How -- how many default?

QUESTION: Your -- your opponent says that the -- that that's -- if you're taking after the thing is

confirmed, after -- that it's a 63 percent.

MR. BRUNSTAD: Yes, Your Honor. There -- there is one study that suggests that, but I must -- I must add that -- that there are other studies that say that the successful completion rate is as low as 3 percent in some jurisdictions. Some 97 percent of chapter 13 fail.

QUESTION: After confirmation.

MR. BRUNSTAD: Those are -- that's a total number, Your Honor.

QUESTION: Okay. That's the difference between your statistics --

QUESTION: Yes.

QUESTION: -- and hers.

QUESTION: Since -- and since this is an after-confirmation case, why -- why don't we take that percentage?

MR. BRUNSTAD: Well, Your Honor, giving them the benefit of the doubt, we -- the best we can say, based upon what we know, is approximately a 63 percent success rate.

QUESTION: After --

QUESTION: What do you say to Mr. Salmons' argument that in fact the -- the plan is not supposed to be confirmed unless the judge makes a -- a determination that it can be followed, and it therefore isn't legitimate

to take this kind of risk into consideration at all?

MR. BRUNSTAD: It's what we call the feasibility standard, Your Honor, and it applies in every single one of the reorganization chapters. The bankruptcy court must merely determine that the bankruptcy judge feels that the debtor will successfully complete the plan. We know, however, that given the extremely high rate of default in chapter 13, which far exceeds chapter 11, for example, that the feasibility standard doesn't even come close to ensuring --

QUESTION: Well, how do we know how -- how many -- what's the percentage of people in this chapter that default within a year on -- on a payment of about $128 a month I guess, that was a small percentage of what they were paying into the court? What's the figure?

MR. BRUNSTAD: Well, there are two sources. The best statistics that I've been able to come up with is that it's about a 60 percent failure rate.

QUESTION: 60 percent fail within a year? You said that 40 percent failed overall.

MR. BRUNSTAD: 60 percent fail within the 3- to 5-year period.

QUESTION: No. I asked you how many -- this is -- or let's take it then giving you the benefit of the doubt. The payment plan was for 17 months. What is the

percentage of people who fail to make a -- I guess it was about 10 percent or 20 percent of the amount he was paying into court. How many fail to make that kind of payment within 17 months?

MR. BRUNSTAD: The statistics are not disaggregated on that basis, Your Honor.

QUESTION: Correct. That's what I would think.

So what is wrong with us saying just by chance what the statute says? What the statute says is, bankruptcy judge, here's what you do. You create a stream of payments such that that stream of payments plus the value of the repossession equals $4,000. Now, that's your job. Go do it. So I would have thought, if I were the bankruptcy judge, the way I'd do it would be by looking to the prime rate and then asking me -- asking you or others to tell me how much riskier this is than the prime rate, and I'd choose a number. And I can't imagine how we're going to come one whit closer than that general instruction, but you'll tell me why it is possible to come closer.

MR. BRUNSTAD: Your Honor, the contract rate is the best evidence, the single best evidence of the market rate.

QUESTION: Contract rate -- if there has to be a number that's wrong, it has to be that one.

MR. BRUNSTAD: But it is less --

QUESTION: The contract rate by definition was entered into at some significant period of time prior to the present, and the present, by chance in this instance, is 2 years later, and we know that interest rates fell at least 1 or 2 percent during that time.

MR. BRUNSTAD: But not for subprime --

QUESTION: So -- what?

MR. BRUNSTAD: But not for subprime loans.

QUESTION: That's impossible. The prime rate --

MR. BRUNSTAD: No, Your Honor. This is why.

QUESTION: If that's so, then the risk went up.

MR. BRUNSTAD: No, that's not correct, Your Honor, and this is why.

QUESTION: No. It isn't?

MR. BRUNSTAD: Because State law caps the maximum rate that can be paid.

QUESTION: Oh, okay. Okay.

MR. BRUNSTAD: So it increases the pool --

QUESTION: All right. All right.

MR. BRUNSTAD: -- of who can be lent to, but not the rate.

QUESTION: All right, because it's a usury problem.

MR. BRUNSTAD: Correct.

QUESTION: So -- so you would be free with your experts to come in and say why it happens to be that the bankruptcy judge is wrong to take the prime rate and add a risk factor, but ordinarily a contract entered into in advance would not be good evidence of what the interest rate is today. Now, where am I wrong in that?

MR. BRUNSTAD: Because, again, the contract rate is the best evidence of a market rate between this borrower and this lender with this particular --

QUESTION: At a prior time.

MR. BRUNSTAD: At a particular time --

QUESTION: Yes.

MR. BRUNSTAD: -- particularly if it's contemporaneous to the filing. It reflècts it and --

QUESTION: Oh, yes, of course. I'm -- but I'm -- I'm simply saying isn't it true by definition that a contract entered into at an earlier period of time where interest rates fluctuate is not going to be very good interest -- evidence of what that interest rate is today.

MR. BRUNSTAD: Well, Your Honor, the contract rate is not perfect, but it's far superior to the formula approach, and what you see happening -- Justice Ginsburg, the Second Circuit in the Valenti case came up with a 3-point factor, just simply canvassing some lower court decisions and decided prime rate plus 1, 2, or 3 points.

It's not based on any evidence. It's just simply based upon what the court felt was an appropriate range.

QUESTION: Your --

QUESTION: If you take Mr. Salmons' point that now we're in bankruptcy, it's a different world, and we've got one creditor -- let's say $4,000 is the principal for both, but one lent at prime and one lent at subprime. Once we're in the universe of bankruptcy, why shouldn't those two lenders, both with $4,000 principals, be treated the same?

MR. BRUNSTAD: If their risks are different, they should be treated differently, Your Honor.

QUESTION: But once you're in the bankruptcy, the risk of getting back the $4,000 is the same for both creditors, isn't it?

MR. BRUNSTAD: Not necessarily so, Your Honor. You can take a situation. Say you have a hotel, a common asset in bankruptcy. The hotel may have a senior secured creditor and a junior secured creditor. The number one secured creditor's risks are materially less than the junior secured creditor's. They would be separately classified. Because their risks are different, the interest rates are different.

In this very case at page 12 of the joint appendix, you can see how the debtor broke down its four

secured creditors into four separate categories, and they have different rates. Two secured creditors are offered 9.5 percent and two are offered 0 percent interest for the payments the debtor is going to make.

The concept of equality of distribution is precisely equality of distribution among similarly situated creditors. Secured creditors are each unique by their own definition of the risks that they take. They have collateral.

QUESTION: And your response to Justice Breyer's question, as I understand it, is that 21 percent may not be precisely what the rate is today for a loan made 3 years ago, but it's going to be a lot closer to it than 8 percent is.

MR. BRUNSTAD: That, plus the fact that the 21 percent is often going to be actually too low to reflect the actual risk being assumed.

QUESTION: Well, that may be. Well, that may be, but what I didn't understand about your answer is when you said that the contract rate must be more accurate than the formula.

MR. BRUNSTAD: It seems to be.

QUESTION: Since the formula by definition is perfect --

MR. BRUNSTAD: No, Your Honor.

QUESTION: Since the formula is an instruction to equate the value of the stream of payments plus repossession with $4,000, the formula by definition is perfect. So --

MR. BRUNSTAD: No, Your Honor.

QUESTION: Well, why isn't it?

MR. BRUNSTAD: The formula rate is essentially standardless, and what we have seen how bankruptcy courts apply the --

QUESTION: You're saying I take -- you're saying that --

QUESTION: But yours is in theory perfect.

QUESTION: Wait. No, no. Answer --

MR. BRUNSTAD: Imperfect. Thàt's correct.

QUESTION: No, no. Yours is in theory perfect just as -- as the formula is in theory perfect. In both of them you -- you begin with a starting point, and then you make whatever adjustments the reality of the risk requires. That brings you theoretically in both cases the perfect answer.

The only question is, as a practical matter, which of the two is likely to come closer to the correct answer, starting with 8 percent that you know is way off the mark and then letting the bankruptcy judge figure out how much you add to that, or starting with 21 percent

which, you know, is -- is -- it could be high, it could be low. It's much fairer to both parties, but then let the bankruptcy judge adjust that a little bit. That's the question: what -- what the practical consequence is not the -- the theoretical. They're both perfect theoretically.

MR. BRUNSTAD: In theory, Your Honor, yes, but we must be faithful to is the statutory command. And here what we see happening is what happens in this case. A bankruptcy judge takes the formula approach, a -- basically a low rate, the prime rate, and is supposed to adjust it. And what do they do? Well, there's no evidence to support any adjustment in this particular case. The debtors' expert did not testify that he knew anything about the risks of these particular debtors. There's no basis for the adjustment. The bankruptcy court did what bankruptcy courts do in these cases; it simply picked a number.

QUESTION: Well, couldn't the creditor have brought in an expert?

MR. BRUNSTAD: The creditor did bring in two witnesses, and the witnesses testified that these particular debtors with their particular credit histories would be charged a 21 percent rate of interest.

QUESTION: Well, can you tell me why is it that

the petitioners tell us that their standard is so much easier to administer? Is it because the courts aren't administering it in the right way? As I listened to it, it seems to me I have two choices. I can begin with a low rate and add or I can begin with a high rate and -- and subtract. Why -- why is one any more easy to administer than -- than the other?

MR. BRUNSTAD: Because --

QUESTION: In fact, it -- it would seem to me -- and this I suppose helps you -- that if the courts which are using the petitioners' formula are doing it the right way, it might even be harder to administer. They -- they avoid that problem by just accepting some interest factor of 1 to 3 percent out of the blue although I don't know how they do that.

MR. BRUNSTAD: Well, Justice Kennedy, what we have is we have three circuits which have adopted the formula approach, and so we have the experience of the courts in those circuits, and we have the balance of the circuits, approximately seven, that have taken more of the market rate approach. And what we see happening is that in those situations where the bankruptcy courts are applying the formula approach, they are systematically giving chapter 13 debtors a rate of interest pretty close to prime. Now, that can't be correct. That gives the

debtors with the single highest default rate in bankruptcy the lowest rates available in bankruptcy.

QUESTION: Would it satisfy you if we said this? Suppose we said we see what we're after here. The objective is to equate the stream of payments plus repossession with $4,000. Now, on the one hand, we know it can't be lower than the prime. On the other hand, if the creditor wants to come in and give a -- present his evidence, the contract, of how risky this person is, then in fact it is evidence absolutely. And the bankruptcy judge will look at it, and he'll try to figure out the pluses and the minuses, what's happened to the interest rate, whether this particular person is a good or bad risk, and he'll choose a number. Don't judges do things like that all the time?

MR. BRUNSTAD: And apparently incorrectly systematically in chapter 13 cases.

QUESTION: But no. But does what I say satisfy you?

MR. BRUNSTAD: No, Your Honor. And here's why.

QUESTION: If not -- because?

MR. BRUNSTAD: Because the true market rate of interest is almost always going to be at least the contract rate, presumptive contract rate, because the costs in chapter 13 are so much more extraordinarily

higher than the costs of collection outside of chapter 13. The automatic stay stays in place for the duration of the plan. If you have a default, the secured party has to come back to the bankruptcy court, hire an attorney, pay a $75 filing fee, argue the case. Bankruptcy judges routinely give the debtor a second chance to cure the default. They have to come back. The costs of collection -- that's even before you get to foreclose on your collateral. The costs of --

QUESTION: But don't you get certain advantages? I mean, you do have the wage order. So there's a court supervising that this wage -- every month that this person, this borrower, is going to have to pay.

And in the -- in -- in that setting you also have -- going back to Rash, the one thing I don't understand about it because it seems you want to take it the high side both ways. You've already been given the replacement value rather than the foreclosure value.

MR. BRUNSTAD: Correct, Your Honor.

QUESTION: So if we're going to do it your way and say, well, now, suppose the lender foreclosed on the asset, made a new loan at the 21 percent rate -- but you would have to use not the replacement value, the higher value. You could only use what you could get on foreclosure if we follow your theory about we should make

it just like you sold the asset, got money, and made a new loan. But the -- but you -- but the amount that you got would be much less than the replacement value which is what you're getting inside the bankruptcy.

MR. BRUNSTAD: Your Honor, the secured creditor in the chapter 13 cramdown context is not trying to make any profit. It's simply trying to mitigate against the enormous losses that it suffers.

QUESTION: But isn't that one of the adjustments that would have to be made? You couldn't say adjust 20 percent against $4,000. You'd have to say $4,000 minus because your foreclosure price is going to be much lower than the replacement costs that you've got in the bankruptcy.

MR. BRUNSTAD: But taking the extremely high risks of default and the costs of actually having to foreclose in the chapter 13 context, the relevant market rate for the value of the stream of payments is always going to be at least the -- the pre-bankruptcy contract rate. In fact, it should --

QUESTION: Mr. Brunstad --

MR. BRUNSTAD: Yes.

QUESTION: -- let me suggest a scary thought.

(Laughter.)

QUESTION: Is it -- is it possible that the

statute does not provide an answer to this question?

(Laughter.)

QUESTION: That since both of these schemes, your proposal and the other side's proposal, are theoretically perfect, if they are done correctly, the bankruptcy court is free to use either one so long as he comes up with the right answer.

MR. BRUNSTAD: No, Your Honor.

QUESTION: I mean, the only thing the statute says is what -- what Justice Breyer keeps coming back to. You have to provide him $4,000 in value.

MR. BRUNSTAD: No, Your Honor. The -- the bankruptcy statutes sometimes are obscure until we see where they come from, which is why we often look at their history. The master concept of cramdown is indubitable equivalence. It comes from Judge Hand's opinion in the Murel Holdings case. And the example in 1325(a)(5)(B) that we're talking about is simply an example of indubitable equivalence. The secured party must be fully compensated for the risk that it must assume. The concept of indubitable equivalence must be completely compensatory. The secured party is not supposed to take uncompensated risk.

QUESTION: Nobody is disagreeing with you about that. That -- what we're -- I think what we're trying to

get to -- it's a practical question. I actually think my approach is more perfect than Justice Scalia's perfect approach.

(Laughter.)

QUESTION: But the reason is it asks the right question.

Now, what you're telling me is that by asking the right question, the bankruptcy judges systematically have not done it right. And -- and I see your point. So -- so what we're -- so we're trying to think of a form of words we could say which would lead -- I can't say take the contract rate because I know that must be wrong.

MR. BRUNSTAD: No, Your Honor.

QUESTION: We could say take the contract rate and go down, and then they'll have the same problem. I -- I mean -- all right. But that's what we want them to do, is to honestly equate the value of the payments with the $4,000.

MR. BRUNSTAD: Yes, Your Honor.

QUESTION: I think everybody wants that, and we're searching -- at least I am -- for a way of how to do that. You keep telling me you take contract rate. I hate to tell you I keep thinking no.

MR. BRUNSTAD: As a presumptive rate, Your Honor. And it's important to understand just after this

Court's decision in Rash set the valuation standard for setting the principal amount, what you see now is that since we got the standard right, in 99 percent of the cases, the parties come to an agreement as to what the value of the collateral is. Once we get the standard right here, you should expect the same thing. It won't be litigated over and over again.

The correct standard is I think to recognize, which I think Your Honor does, that this concept of present value is an economic concept, not an equitable one, and that essentially what we're doing is we're saying there is a stream of payments to be made here and we have to figure out what it's worth. The best test for what it's worth would be what the market says.

Now, the problem is, is that in chapter 11 there is a market. People do lend to chapter 11 debtors, and the standard is the same in chapter 11 as 13: value as of the effective date of the plan under 1129. So what we -- we have to be very careful about is in chapter 11, the markets do value debtors' promises to pay and they lend money and they charge very high interest rates. Exit lenders or finance lenders charge very high interest rates, 18, 19, 20 percent. It can't be true that in bankruptcy, in chapter 13, where the riskiest chapter -- riskiest debtors with the highest default rate, that we

systematically give them a rate which approaches prime. So I think what you need to do, recognizing it's an economic concept, is say what's the best evidence of a market rate.

QUESTION: I understand. Tell me an -- a question I don't know the answer to.

MR. BRUNSTAD: Yes, Your Honor.

QUESTION: When -- when -- if you repossess -- if he defaults again -- I mean, the first time he got into bankruptcy. Now, we've got the plan.

MR. BRUNSTAD: Yes.

QUESTION: And suppose he doesn't make the payments on the truck. Does it then cost you a lot of money to go back even though you say to the judge, judge, this is the second time? We'd like our truck now. It's only worth $2,000 now. And you still have to pay the $75, get your witnesses and everything the second time?

MR. BRUNSTAD: What happens the second time, Your Honor, is if the debtor defaults under the plan, the automatic stay is still in effect. Unlike chapter 11 cases, where the automatic stay terminates when the plan is confirmed or becomes effective, here the automatic stay stays in place until the end of the repayment period. So if the debtor defaults under the plan, someone has to go back to court and say, I need relief. I need relief from

the automatic stay to exercise my collection rights.

A corporation like SCS can't go back to court pro se. It needs a lawyer. You have to hire somebody to go and represent them. You have to pay a filing fee. Oftentimes the bankruptcy judge gives the debtor a second chance to cure the default under the plan. Then the debtor says I'll cure, and then you come back a second time, sometimes a third time, sometimes a fourth time, sometimes a fifth time, incurring costs at each juncture. On loans that typically range between $5 to $15,000, having to go to court even once --

QUESTION: Is that compensated for to some extent --

MR. BRUNSTAD: No, Your Honor.

QUESTION: -- that factor by the fact they're using Blue Book value to value the car rather than what it'd actually be worth in your hands once you repossess it?

MR. BRUNSTAD: No, Your Honor. I think that covers the depreciation problem. As we have delay and not payment, we have a rapidly depreciating asset, which the debtor is continuing to possess and drive around. This interest rate compensate for the risk of nonpayment of the promises to pay after confirmation and the costs associated with the debtor's default if the debtor does

default under the plan.

QUESTION: I -- I don't think it's certainly conclusive of the point, but the initial 21 percent rate, I take it, did take into account the risk of default. So in a sense, the creditor has received up front some compensation for the risk that in fact has occurred.

MR. BRUNSTAD: Yes, but at the time the loan is made, Your Honor, we don't know who in the pool of -- of debtors is going to default. Once the default happens --

QUESTION: Well, but -- but overall, you account for that.

MR. BRUNSTAD: Overall the risks are spread, but if you force the secured party to systematically subsidize interest rates to chapter 13 debtors, who have now demonstrated by their filing they are the riskiest of the risky, what you will eventually have happen is a contraction of the ability to lend.

QUESTION: But -- but your original -- you charge 21 percent, and a lot of people are going to successfully pay that and that stream there takes into consideration some account for those who don't pay and go into bankruptcy, doesn't it?

MR. BRUNSTAD: Yes, Your Honor, but we shouldn't reward those who file bankruptcy with a rate that is less, since they are the riskiest of the risky, than we would

charge the other members of the pool who avoid bankruptcy.

QUESTION: Maybe they're not.

QUESTION: The -- the Bankruptcy Code, I take it, has solicitude for debtors. Isn't that one of its purposes?

MR. BRUNSTAD: Yes, but --

QUESTION: Or does that just drop out when we come to the cramdown problem?

MR. BRUNSTAD: As this Court indicated in the Johnson case, section 1325(a)(5)(B) is for the protection of creditors. It is a limit on the debtor's ability to adjust or restructure the creditor's rights. It is the creditor's protection. The debtor has options. If the debtor wants to surrender the collateral, it may and discharge the debt. That is the protection for the debtor.

QUESTION: But what about then taking this idea? I'm trying to figure out how -- we say, okay, we really mean it. It has to equate those two things. Now, that put -- and -- and then stop and say, you can do it with -- I -- I think, you know, prime plus or whatever, maybe the other. But -- but then put the burden back on you to produce some real evidence and statistics about what happens to people we don't know about.

Now, who are those people? We agree they've

gone into bankruptcy, so they're risky, but they're also trying to get a second chance, and they also want to keep things like the truck because it will help them in their business. And the bankruptcy judge has sat there and looked them in the eye. And you have all those things about it which you don't have about the people you're giving the 21 percent to which is a great mass of undifferentiated people.

So then you have the burden of trying to bear it out with statistics and so forth that these people really are risky. And the bankruptcy judge can't just sit there and say, oh, I feel sorry for them. All right? What about something like that?

MR. BRUNSTAD: Well, Your Honòr, when we get to the chapter 13 confirmation stage, we're in a similar position as when we are at the beginning of making loans to a pool of applicants. We don't know who's going to default and who doesn't. We do know that a large percentage will. We do know that the best evidence of a market rate for these particular class of borrowers is the contract rate. And the question then becomes, do we want to have a system which requires us in each bankruptcy case then to take evidence complicatedly in 471,000 chapter 13 cases as to, gee, we need statistics and evidence as to this individualized debtor?

QUESTION: No, I mean, you wouldn't have to go that far. Maybe you just have to do it in one or two. But at least we'd get to the stage of people who have trucks and use them for a year and, you know, at least we'd have somewhat better information than just knowing about the default rate in bankruptcy cases in general. And we get a little finer than that. You see, that's what I'm trying to work with. I don't have an answer.

MR. BRUNSTAD: I understand.

QUESTION: I'm asking.

MR. BRUNSTAD: I understand, Your Honor, and I wish I could give you a precise formula. The problem is that these things are normally left to the market to do. Congress has said -- Congress has said basically use an economic market concept here in a context in which the default rate is so high that lenders are just not willing to lend to chapter 13 debtors. Again --

QUESTION: But -- but I -- I thought difficulty of administration charge was the one that the petitioners were making against you. How -- how do I sort that out?

MR. BRUNSTAD: And I think -- I think it was Your Honor who also mentioned that -- that our standard is no less cumbersome than theirs. We think it is superior because it will yield the correct result more often.

QUESTION: No more cumbersome. Surely, you mean

it's no more cumbersome than theirs.

MR. BRUNSTAD: Yes, Your Honor. I -- I misspoke. Excuse me.

QUESTION: Well, Mr. -- Mr. -- it is to this extent. Most of these debtors are very small debtors. You say take the contract rate as the presumptive rate and then we're going to knock down for all these other things. The high replacement cost that -- is one thing. The interest that they got before bankruptcy is another. The transaction cost that they're saved, another. And so let the debtor come in and show that. But the debtor has no money at all and certainly you don't want the debtor's money eaten up hiring an attorney and further depleting the money that could go to the creditors.

So it seems to me wildly unrealistic to expect that if you say the presumptive price is the contract price, you're going to get a debtor who will be able to -- I mean, I was surprised, looking at this record, that this debtor got an expert. Who -- who paid the expert? Maybe because the union was involved?

MR. BRUNSTAD: I do not know the answer to that, Your Honor.

QUESTION: But isn't it typical that these chapter 13 debtors don't have lawyers and don't have experts?

MR. BRUNSTAD: No. They often have lawyers, Your Honor.

But let me suggest this. If the Court were to set the rate at the presumptive -- the contract as the presumptive rate, this is what would happen and this is what has happened in circuits where that is so. The -- the contract rate becomes the presumptive rate, and in most cases the debtor will offer that in its plan -- in his or her plan as the appropriate rate. If the debtor doesn't like that, we'll offer less of a rate and then what happens is a negotiation. And the debtor and the secured party get together and they negotiate based upon the debtor's presentation of this is why I think it should be adjusted off of that because my circùmstances have improved or there's a lot of equity in this particular collateral, so your risks are less, so you're more protected. And those various reasons can then be given, and then the parties can negotiate.

If, however, you set a standard where the bankruptcy court is just simply going to decide based upon the evidence that the parties put in, we're not going to adopt the formula approach, then you'll be back to the problem where we are before, lots of litigation. Again, because the contract rate is the best evidence of a -- of a market rate between these parties, it should be the

presumptive rate and we should work from that.

QUESTION: Is there any --

QUESTION: May I ask you a question that's run through my mind listening to this argument? Going back to the Rash case, was it, that we --

QUESTION: Yes.

QUESTION: -- we did not there -- the majority did not there. I was in dissent in that case.

MR. BRUNSTAD: Yes, Your Honor.

QUESTION: -- did not take the case to try and replicate what would have happened if there had been no bankruptcy. They said, we won't -- won't treat it as a -- now, you're in effect asking we do treat the case as close as possible to what you would have negotiated in a free market.

MR. BRUNSTAD: Not quite, Your Honor. I think actually this is the same analysis as in Rash. What the Court said in Rash that the parties had to do was the debtor had to go out -- the debtor already has the truck -- had the truck in Rash -- is go out and see what it would have cost the debtor to replace that truck. It didn't actually do it, but simply say what would it have cost.

The same principle applies here. The debtor should actually go out and see what would someone pay.

How much would someone charge to finance this debtor's loan?

QUESTION: Yes, but in doing that, they were saying, we're going to do that instead of trying to predict what would happen to -- in the normal course of events between the contracting parties if bankruptcy had not intervened.

MR. BRUNSTAD: Well, that's true. In this case, though, that also applies. What would happen if bankruptcy had not intervened is the secured party would have foreclosed, repossessed the collateral, and avoided all the costs.

QUESTION: But not at replacement value. You would not have gotten replacement value.

MR. BRUNSTAD: That's true, Your Honor, but the reason why you have replacement value is because the debtor is going to keep the -- the collateral and prevents the secured party from exercising its rights and forces the secured party to incur costs that it otherwise would avoid.

Now, the whole purpose of the value requirement and the indubitable equivalent concept and the whole cramdown standard is to make sure the secured party doesn't -- isn't shouldered with uncompensated risk.

So the question becomes what's best method of

compensating the secured party for its risk. And the statute, because of what it requires, value as of the effective date of the plan using an economic concept, says we basically have to value the stream of payments. Nobody really is willing to say I would give this debtor $4,000 or take this debtor's promise of payment of $4,000 at -- at a prime rate or anything close to a prime rate. Again, the contract date is the best evidence of a market valuation that we have. And so that's what I think we have to work with --

QUESTION: Is there any --

MR. BRUNSTAD: -- to be faithful to the statute.

QUESTION: Is there any indication that if we take that, that in fact it will increase the likelihood of default under the plan simply because the higher contract rate will tend to put more pressure on the -- the debtor than the debtor in fact ultimately can -- can satisfy?

MR. BRUNSTAD: Well, Your Honor, in the circuits where that already is the standard, that the -- that the presumptive rate is basically the rate that we use.

QUESTION: Yes. What is their experience?

MR. BRUNSTAD: There -- there is no information to say it's higher default rate. And certainly the fact that most of the circuits have this standard has not

stopped chapter 13 from being filed. They keep -- every year the number goes up. So we're now at about 470,000 chapter 13 cases a year.

QUESTION: But it seems pretty obvious if it's a higher rate, there are going to be more defaults.

MR. BRUNSTAD: Well, not necessarily, Your Honor, for this reason. Because the debtor makes -- the -- the debtor does not make payments directly to creditors under the chapter 13 plan. The debtor makes payments to the chapter 13 trustee as a dispersing agent, and the chapter 13 trustee then distributes the money. What you're doing here is you're reallocating in this case a few hundred dollars away from unsecured creditors toward the secured creditor because, again, the statute says the secured creditor is not required to take -- shoulder uncompensated risk for the benefit of anybody else. That's --

QUESTION: Why not take the credit card rate?

MR. BRUNSTAD: Sorry, Your Honor?

QUESTION: Why not take the credit card rate? Why not take his mortgage rate? I mean, you see, those aren't the right rates, are they?

MR. BRUNSTAD: Here we have a situation in which the correct rate for auto loans is evidenced by -- I think best evidenced by the auto loan contract. It is a loan

between this lender and this debtor, decided in the marketplace, with this particular collateral. It is the best evidence of a market rate that we have. It's not perfect, Your Honor. I concede that, but it is the best evidence.

QUESTION: It's evidence at a different time before you had all the considerations. I mean, we're going in circles, and I mean, in some respects it's good, in some respects it's bad.

QUESTION: Thank you, Mr. Brunstad.

Ms. Harper, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF REBECCA J. HARPER

ON BEHALF OF THE PETITIONERS

MS. HARPER: Thank you, Mr. Chief Justice.

First of all, we need to get back to the concept of present value. Present value is the time value of money, which is the real rate of interest plus inflation. The record in this case shows that the real rate of interest was 2-and-one-half percent, and inflation was 3-and-one-half percent.

Now, in this case, the debtors made all the payments. They actually paid the contract off early, but we need to start with as pure a base as possible and then if there are special circumstances, sure, the bankruptcy court could have discretion to add on if there is

particular jeopardy to the property.

But we're measuring two different things here. The -- the statute doesn't say contract. The statute doesn't say market rate. This market rate concept has been misabused. And it -- right now under the bankruptcy court's interpretation anything is okay as long as you put this market rate label on it, and that's not a proper standard for chapter 13 confirmation.

The other problem is with the respondent's approach, the respondent uses words out of the Bankruptcy Act, pre-Bankruptcy Act, that simply were never enacted under chapter 13. Full compensation, full value of their rights. That's nowhere in chapter 13. It's not a part of the chapter 13 requirements. Indubitable equivalence. That's not a chapter 13 confirmation concept. That's a -- that's a concept that was brought in to confuse this issue, but it is not chapter 13.

Respondents -- their amicus said that under their interpretation of the statute, basically anything goes. A rate from 100 percent to 300 percent would be just fine with them. Congress has not chosen to protect subprime creditors. This goes against --

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Harper.

The case is submitted.

(Whereupon, at 12:13 p.m., the case in the

above-entitled matter was submitted.)